United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7332

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

DOCKET NO. 76-7332

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff-Appellant,

against

COSTA LECOPULOS, a/k/a CONSTANTINOS LEKOPOULOS,

Defendant-Appellee

On Appeal From The United States District Court For The Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Other Authorities

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

POINT I

LECOPULOS' AGREEMENT TO ARBITRATE IN NEW YORK VESTS JURISDICTION HERE

At pages 17-22 of the main brief for plaintiff-appellant Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), we set out numerous cases which hold that an agreement to litigate or arbitrate in a given jurisdiction is a consent to personal jurisdiction in the place selected. Defendant-appellee Costa Lecopulos ("Lecopulos") signed such

an agreement: he agreed to arbitrate in New York pursuant to the laws of New York (53-54(a)*). Therefore, personal jurisdiction was vested in the District Court below.

In his appellate brief, Lecopulos argues that his consent is limited to arbitration and is not a consent to jurisdiction in the Court below (Lecopulos brief, pp. 19-20). Lecopulos cites no authority whatsoever in support of this contention for the simple reason that the law of this Circuit is to the contrary. As stated in Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 363 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965):

> "We hold that the district court had in personam jurisdiction to enter the order compelling arbitration. By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York. To hold otherwise would be to render the arbitration clause a nullity. In Farr & Co. v. Cia. Intercontinental De Navegacion, 243 F.2d 342 (2 Cir. 1957) and Orion Shipping & Trading Co. v. Eastern States Petro. Corp. of Panama, 284 F.2d 419 (2 Cir. 1960), this court held that § 4 of the United States Arbitration Act provides sufficient jurisdictional basis for the district court to order a foreign corporation which had agreed to arbitration in New York to submit to arbitration." (Emphasis added)

Accord: Island Territory of Curacao v. Solitron Devices, Inc.,

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* Reference is to the pages of the Joint Appendix.

489 F.2d 1313 (2d Cir. 1973), cert. denied, 416 U.S. 986 (1974); Reed & Martin Inc. v. Westinghouse Electric Corp., 439 F.2d 1268, 1276 (2d Cir. 1971).

In light of Lecopulos' consent, it was error for the Court below to grant the motion to dismiss and to deny Merrill Lynch's motion to compel the arbitration that Lecopulos had agreed to.

POINT II

THERE ARE NO FACTUAL ISSUES REGARDING LECOPULOS' AGREEMENT TO ARBITRATE

Obviously recognizing that he has consented to personal jurisdiction, Lecopulos suggests there are factual issues which must be considered on remand prior to arbitration. There are none.

First, it is argued that there is no agreement to arbitrate because the agreement was in English, a language with which Lecopulos purportedly lacks familiarity. Courts have made short shrift of such arguments. Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361 (S.D.N.Y. 1975). Lecopulos' brief implies he was unaware it was an agreement.* However, it is settled law that one who signs a written contract or document, in the absence of fraud or other wrongful act on the part of

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* We note Lecopulos himself makes no claim in his affidavits that he did not know what he was signing, that he thought it was a bank signature card or indeed that he does not understand English (39-41, 61-62(a)). This comes from the fertile minds of his able lawyers.

the other contracting party, is bound by the conditions, terms and provisions therein. As stated by the New York Court of Appeals in Pimpinello v. Swift & Co., 253 N.Y. 159, 162-63, 170 N.E. 530, 531 (1930):

> "The signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material. (Citation omitted). If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him."

See also Metzger v. Aetna Ins. Co., 227 N.Y. 411, 416, 125 N.E. 814, 816 (1920). Lecopulos is bound by the arbitration clause in the customer agreement, inasmuch as the "duty to read rule" applies with as equal force to an arbitration clause as it does to other provisions typical of standard commercial agreements. Cornell & Co. Inc. v. Barber & Ross Co., 360 F.2d 512 (D.C. Cir. 1966).

Second, it is claimed that the agreement is unconscionable because Lecopulos would have to travel to the United States. The short answer to this conclusory claim is that Lecopulos contracted to arbitrate in New York. We submit it is Lecopulos who unconscionably seeks to walk away from his agreement and his debts.

Third, Lecopulos argues arbitration is time-barred because Merrill Lynch did not commence proceedings within one year after Lecopulos refused to pay the debts he incurred in December, 1974. To the contrary, on April 22, 1975 - well

within one year - Merrill Lynch filed its motion to compel arbitration pursuant to its agreement with Lecopulos (28-34(a)). Presumably this prompted Lecopulos' motion to dismiss for lack of personal jurisdiction which was filed some five months later (38(a)).

Fourth, Lecopulos argues Merrill Lynch has waived its right to arbitrate by seeking a judgment for damages. Under federal law, Merrill Lynch has not waived its right to compel arbitration by seeking an attachment in court. Chatham Shipping Co. v. Fertex Steamship Corp., 352 F.2d 291, 293 (2d Cir. 1965); Carcich v. Rederi, 389 F.2d 692, 696 (2d Cir. 1968). Nor has Merrill Lynch waived its right to compel arbitration under New York law.*

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* Under New York law, one does not waive a right to compel arbitration merely by seeking a writ of attachment. Waiver cannot be inferred from "the mere commencement of an action." Newburger v. Lubell, 257 N.Y. 383, 386-87, 178 N.E. 669 (1931); McGorman v. Motor Vehicle Accident Ins. Corp., 29 App. Div. 2d 528, 285 N.Y.S. 2d 922 (1st Dept. 1967); Application of Travelers Indemnity Co., 235 N.Y.S. 2d 718 (Sup. Ct. Westchester Co. 1962), aff'd, 246 N.Y.S. 2d 1015 (2d Dept. 1964); In re American News Co., 130 N.Y.S. 2d 554 (Sup. Ct. N.Y. Co. 1954). The case of Matter of Zimmerman (Cohen), 236 N.Y. 15 (1923), cited by Lecopulos, is not to the contrary. There, the court held that the defendant had waived his right to compel arbitration by answering a complaint, noticing the case for trial, and taking depositions of certain witnesses in China. Similarly, as Lecopulos notes, the result in Matter of Young v. Crescent Development Corp., 240 N.Y. 244 (1925), has been changed by statute. In this case, Merrill Lynch took the minimum court action necessary to obtain or to keep its order of attachment. It did not waive its right to arbitrate.

Moreover, New York law does not apply to the question. The law governing the availability of arbitration in the District Court, to which Lecopulos removed this action, is federal law. See Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967); Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402 (2d Cir. 1959), cert. dismissed, 364 U.S. 801 (1960). The primacy of federal law in arbitration contracts pertaining to interstate commerce has also been recognized by New York Courts. See In the Matter of A/S J. Ludwig Mowinckels Rederi (Dow Chemical Company), 25 N.Y. 2d 576, 307 N.Y.S. 2d 660 (1969).

In matters involving interstate or foreign commerce, federal arbitration law applies despite an express choice of state law by the parties. This was pointed out in Robinson v. Bache & Co., 227 F.Supp. 456 (S.D.N.Y. 1964), where the court ordered arbitration of a dispute involving sugar contracts:

> "Since the agreement is within the Federal Arbitration Act, defendant's motion is properly brought under the Act, notwithstanding that the agreement provides that it shall be governed by New York law." 227 F.Supp. at 458 n.

See also Austin v. A. G. Edwards & Sons, Inc., 349 F.Supp. 615 (M.D. Fla. 1972). Therefore, since Merrill Lynch moved to compel arbitration before joinder of issue in this action, and since issue still has not been joined, no waiver has

occurred. Arbitration should be directed in accordance with the United States Arbitration Act, pursuant to the Carich and Chatham Shipping cases, supra.

Lecopulos' brief points out (p. 25) that § 8 of the United States Arbitration Act specifically provides that in maritime cases the court may direct arbitration after the libel and seizure of a vessel. He claims this implies that the remedy of an attachment cannot co-exist with arbitration in other types of cases. However, he cites no case support and his reasoning is faulty. The United States Constitution extends the "judicial power of the United States" to "all cases of admiralty and maritime jurisdiction." U.S. Const. Art. III § 2. Hence, it is not surprising that a federal statute should make special provision for maritime cases. In all other arbitrable matters, the use of an attachment depends on whether "such procedure is available under the applicable law," which would be state law. See The Anaconda v. American Sugar Co. 322 U.S. 42, 44 (1943).

POINT III

LECOPULOS' SUBSTANTIAL BUSINESS ACITIVITY IN NEW YORK IS A FURTHER BASIS OF JURISDICTION HERE

Lecopulos raises the specter of clogged court dockets and surprised foreigners who find themselves litigating in

New York as a result of the independent acts of agents. This chimera has no factual relationship to the case at bar. Even if Lecopulos had not agreed to arbitrate here, he would still be subject to New York jurisdiction because of the substantial business activity he deliberately chose to conduct in this forum.

Lecopulos directed the purchase and sale of some 279 New York sugar contracts aggregating more than $15,000,000 (15-20(a)). As Lecopulos knew, New York sugar contracts are traded at one and only one place - the New York Coffee and Sugar Exchange, 79 Pine Street, New York, New York. Placing specific orders for these specific commodity futures contracts in New York is thus distinct from general orders to purchase or sell securities, for a security may be traded on stock exchanges in New York or many other places. In the absence of specific instructions, a broker has discretion to execute an order on different exchanges in different locations. If the security is, in fact, purchased in New York, that is a purely fortuitous event, which the customer cannot be said to have intended.

This distinction renders inapposite the New York state cases relied upon by Lecopulos, which hold that a New York securities broker who elects to fill an out-of-state customer's

order on the New York Stock Exchange does not acquire jurisdiction over the customer in New York. Indeed, in Hertz, Newmark & Warner v. Fischman, 53 Misc. 2d 418, 279 N.Y.S. 2d 97 (Civ. Ct. N.Y. Co. 1967), cited at p. 16 of Lecopulos' brief, the Court expressly noted:

> "At no time had the defendant ever specified where the stocks were to be bought or where they were to be sold. The defendant would telephone the plaintiff's representative at its Newark office to buy or sell a particular stock." 53 Misc. 2d at 419, 297 N.Y.S. 2d at 99.

See also Drexel Burham & Co. v. Silverman, 75 Misc. 2d 904, 349 N.Y.S. 2d 293 (Civ. Ct. N.Y. Co. 1973) (Lecopulos' brief, p. 16).

However, New York jurisdiction has been found where a customer intended to trade on a specific stock exchange in a specific jursidiction. In F. I. duPont v. Chelednik, 69 Misc. 2d 362, 330 N.Y.S. 2d 149 (App. T. 1st Dept. 1971), the defendant was a customer of the plaintiff who "traded on New York stock exchanges through plaintiff" 69 Misc. 2d 362. The court found this sufficient for purposes of New York personal jurisdiction stating:

> "[O]peration of the account in New York constituted the transaction of business in New York. One need not be physically present in New York to be subject to the jurisdiction of our courts under CPLR 302. One 'can engage in extensive purposeful activity here without ever actually setting foot in the State' (Parke-Bernet Galleries v. Franklyn, 26 N.Y. 2d 13, 17)." 69 Misc. 2d at 363, 330 N.Y.S. 2d at 150.

In this case, Merrill Lynch did not have discretion, as did the brokers in the Hertz and Drexel Burnham cases, where to place Lecopulos' orders. It was not an agent on a frolic and detour of its own. Lecopulos exercised complete control over Merrill Lynch's activities in New York, directing the purchase and sale of 279 sugar contracts in New York. Lecopulos' rejoinder that "the fact that New York was the site ... was a mere incidental result of the structure of the commodities market" ignores his expressed intentions at the time (47a). As in Frummer v. Hilton Hotels International Inc., 19 N.Y. 2d 533, 537, 281 N.Y.S. 2d 41, 227 N.E. 2d 851 (1967), cert. denied, 389 U.S. 923 (1967), he did "all the business which [he] could do were [Lecopulos] here".

There is a second distinction. Unlike the purchaser or seller of a stock or bond, a purchaser or short seller of a commodity futures contract enters into a binding bilateral contract to accept or to deliver a specific quantity of a specific commodity. (Specimen copies of the New York Stock Sugar 10 and 11 contracts are set forth in the Joint Appendix (57-58a).) The terms of such a bilateral contract were discussed in McCurnin v. Kohlmeyer & Co., 340 F.Supp. 1338, 1341 (E.D. La. 1972):

> "A commodity future contract is no more or less than an option; the purchaser agrees to take delivery, or the seller agrees to make delivery, of a specific quantity of a specified commodity at a specified future time at a specified price. Unless the investor reverses his position timely by selling what

> he has bought or buying what he has sold, he must accept delivery of the commodity and pay the full purchase price as set by the contract (or deliver the commodity against full payment, if he has sold)."

That Lecopulos ultimately liquidated his contracts without making or receiving delivery of the sugar does not alter the fact that he entered into bilateral contracts with third parties, through the New York Coffee and Sugar Exchange Clearing Association. See McKurnin, supra, 340 F.Supp. at 1342; Seligson v. New York Produce Exchange, 378 F.Supp. 1076, 1081 (S.D.N.Y. 1974).

The existence of bilateral commodities contracts also distinguishes the instant case from Haar v. Armendaris Corp., 31 N.Y. 2d 1040, 342 N.Y.S. 2d 70, 294 N.E. 2d 855 (1973), and from the cases mentioned in footnote 2 to Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y. 2d 13, 308 N.Y.S. 2d 337, 256 N.E. 2d 506 (1970). Unlike the defendants in those cases, Lecopulos did enter into binding contracts with third parties in New York. As pointed out in Merrill Lynch's main brief (p. 9), Lecopulos purchased his contracts through Merrill Lynch as his agent. After Lecopulos defaulted, Merrill Lynch had to step in and satisfy his contracts, thereby becoming a forced lender and a substitute principal in place of Lecopulos. Unlike Mr. Haar, Merrill Lynch is not simply

suing for its own compensation. It is suing for its out-of-pocket loss in performing Lecopulos' contracts with third parties.

These distinctions establish that there is no conflict with Haar and that a finding of personal jurisdiction here is soundly based upon New York law. We respectfully suggest that had they been considered in Helfer Commodities Corp. v. Pellegrino, 390 F. Supp. 520 (S.D.N.Y. 1975), Judge Brieant would have found in personam jurisdiction rather than merely criticizing Haar as "an illogical judicially imposed gloss".*

POINT IV

LECOPULOS SHOULD BE REQUIRED TO HONOR HIS AGREEMENT

Throughout his brief Lecopulos argues that it would be unfair to require him to come to New York. Although candidly admitting he does not fit the widows and orphans classification, Lecopulos pictures Merrill Lynch as a mischievous multi-national corporation which would drag him from his homeland for no valid reason. He implies there is no discovery to be had here - an apparent change of mind since, prior to Merrill Lynch's motion to compel arbitration, Lecopulos noticed various depositions and served a "first" request to produce documents (35-37(a)). Lecopulos contends

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* Lecopulos relies heavily on Helfer. This reliance is misplaced, not only for the reason stated above but also because of the absence of an agreement to arbitrate in New York.

that he was a total novice in commodities trading, that Merrill Lynch breached its rules and behaved terribly, that Lecopulos and his business will suffer grievously from arbitration here and that Merrill Lynch will exert unfair leverage. None of these arguments has a basis in the record on appeal. Lecopulos' agreement to arbitrate in New York is, however, in the record as is his placing of millions of dollars of orders to buy and sell commodities here. We submit that not only as a matter of law but also as a matter of fairness he should honor his agreement to arbitrate in New York with regard to the sizeable debts he incurred here.

CONCLUSION

Based upon Lecopulos' agreement to arbitrate and his substantial business activity here, this Court should reverse the judgment of the Court below and should remand this case with directions that this action be stayed and that the parties proceed to arbitration in accordance with their agreement.

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Respectfully submitted,

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